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Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2015 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through April 3, 2015. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through April 3, 2015.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
John Marshall Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2015 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2015 supplement pamphlets and in the bound volumes of the Code.

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TITLE 4

ANIMALS

Chap.

CHAPTER 3

LIVESTOCK RUNNING AT LARGE OR STRAYING

Sec.

4-3-8. Return and disposition of proceeds of sale.

(a) The sheriff, upon making a sale or other disposal as provided for in this chapter, shall forthwith make a written return thereof to the clerk of the superior court of such county, with a full and accurate description of the livestock sold or disposed of by him, to whom, and the sale price thereof, which report shall be filed by the clerk.

(b) At the time of making his return, the sheriff shall pay over to the clerk of the superior court the entire proceeds of the sale. The clerk of the superior court shall pay all costs and fees allowed in Code Section 4-3-10. If there is any balance remaining it shall be paid to the owner of such livestock, provided that the owner shall provide satisfactory proof of ownership to the board of county commissioners within 90 days from the date the sheriff reports the sale. If proof of ownership is not made within 90 days from the date the sheriff reports the sale, the clerk shall pay such proceeds into the fine and bond forfeiture fund of the county. The clerk shall keep a permanent record of all sales, disbursements, and distributions made under this chapter. If the amount realized from the sale or other disposition of the animal is insufficient to pay all fees, costs, and expenses as provided for in Code Section 4-3-10, the deficit shall be paid by the county from its fine and bond forfeiture fund. (Ga. L. 1953, Jan.-Feb. Sess., p. 380, § 8; Ga. L. 2015, p. 693, § 3-33/HB 233.)

The 2015 amendment, effective July 1, 2015, substituted "fine and bond forfeiture fund" for "fine and forfeiture fund" in the fourth and sixth sentences of subsection (b). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

CHAPTER 8

DOGS

Article 2

Responsible Dog Ownership

Sec.

ARTICLE 2

RESPONSIBLE DOG OWNERSHIP

4-8-22. Jurisdiction; designation of dog control officer; consolidation of services.

(a) A county's jurisdiction for the enforcement of this article shall be the unincorporated area of the county and a municipality's jurisdiction for such enforcement shall be the territory within the corporate limits of the municipality.

(b) The governing authority of each local government shall designate one or more individuals as dog control officers to aid in the administration and enforcement of the provisions of this article. An individual carrying out the duties of dog control officer shall not be authorized to make arrests unless he or she is a law enforcement officer having the powers of arrest.

(c) Any county or municipality or any combination of such local governments may enter into agreements with each other for the consolidation of dog control services under this Code section. (Code 1981, § 4-8-22, enacted by Ga. L. 2012, p. 1290, § 4/HB 685; Ga. L. 2014, p. 371, § 1/SB 290.)

The 2014 amendment, effective July 1, 2014, in subsection (b), substituted "one or more individuals as dog control officers" for "an individual as dog control officer" in

the first sentence and, in the second sentence, substituted "An individual" for "A person" at the beginning and substituted "he or she" for "the person" in the middle. See editor's note for applicability.

Editor's notes. — Ga. L. 2014, p. 371, § 6/SB 290, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2014, and shall apply to all violations and confiscations which occur on or after that date."

4-8-23. Investigations by dog control officer; notice to owner; hearings; determinations by hearing authority; judicial review.

(a) For purposes of this Code section, the term:

(1) "Animal shelter" shall have the same meaning as set forth in Code Section 4-14-2.

(2) "Authority" means an animal control board or local board of health, as determined by the governing authority of a local government.

(3) "Mail" means to send by certified mail or statutory overnight delivery to the recipient's last known address.

(b) Upon receiving a report of a dog believed to be subject to classification as a dangerous dog or vicious dog within a dog control officer's jurisdiction, the dog control officer shall make such investigations as necessary to determine whether such dog is subject to classification as a dangerous dog or vicious dog.

(c) When a dog control officer determines that a dog is subject to classification as a dangerous dog or vicious dog, the dog control officer shall mail a dated notice to the dog's owner within 72 hours. Such notice shall include a summary of the dog control officer's determination and shall state that the owner has a right to request a hearing from the authority on the dog control officer's determination within seven days after the date shown on the notice; provided, however, that if an authority has not been established for the jurisdiction, the owner shall be informed of the right to request a hearing from the probate court for such jurisdiction where the dog was found or confiscated within seven days after the date shown on the notice. The notice shall provide a form for requesting the hearing and shall state that if a hearing is not requested within the allotted time, the dog control officer's determination shall become effective for all purposes under this article. If an owner cannot be located within ten days of a dog control officer's determination that a dog is subject to classification as a dangerous dog or vicious dog, such dog may be released to an animal shelter or humanely euthanized, as determined by the dog control officer.

(d) When a hearing is requested by a dog owner in accordance with subsection (c) of this Code section, such hearing shall be scheduled

within 30 days after the request is received; provided, however, that such hearing may be continued by the authority or probate court for good cause shown. At least ten days prior to the hearing, the authority or probate court conducting the hearing shall mail to the dog owner written notice of the date, time, and place of the hearing. At the hearing, the dog owner shall be given the opportunity to testify and present evidence and the authority or probate court conducting the hearing shall receive other evidence and testimony as may be reasonably necessary to sustain, modify, or overrule the dog control officer's determination.

(e) Within ten days after the hearing, the authority or probate court which conducted the hearing shall mail written notice to the dog owner of its determination on the matter. If such determination is that the dog is a dangerous dog or a vicious dog, the notice of classification shall specify the date upon which that determination shall be effective. If the determination is that the dog is to be euthanized pursuant to Code Section 4-8-26, the notice shall specify the date by which the euthanasia shall occur.

(f) Judicial review of the authority's final decision may be had in accordance with Code Section 15-9-30.9. Judicial review of a probate court's final decision shall be in accordance with Code Section 5-3-2 and costs shall be paid as provided in Code Section 5-3-22. (Code 1981, § 4-8-23, enacted by Ga. L. 2012, p. 1290, § 4/HB 685; Ga. L. 2014, p. 371, § 2/SB 290.)

The 2014 amendment, effective July 1, 2014, in subsection (a), added paragraph (a)(1); redesignated former paragraphs (a)(1) and (a)(2) as present paragraphs (a)(2) and (a)(3), respectively; in subsection (c), in the second sentence, substituted "seven days" for "15 days" and added the proviso, deleted "also" preceding "provide" near the beginning of the third sentence and added the fourth sentence; inserted "or probate court" in three places in subsection (d) and near the beginning of subsection (e); and, in subsection (f), substituted "Code Section 15-9-30.9" for "Code Section 50-13-19" at the end of the first sentence and added the second sentence. See editor's note for applicability.

Editor's notes. — Ga. L. 2014, p. 371, § 6/SB 290, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2014, and shall apply to all violations and confiscations which occur on or after that date."

4-8-27. Certificates of registration; requirements for issuance of certificate; individuals excluded from receiving registration; limitation of ownership; annual renewal.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 4-8-27 are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

4-8-28. Notifications by owner; change in ownership of dog; changes in residence.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 4-8-28 are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

4-8-29. Limitations on dog's presence off of owner's premises; penalty for violation; defense.

OPINIONS OF THE ATTORNEY GENERAL

Fingerprinting required. — Misdemeanor offenses arising under O.C.G.A. § 4-8-29 are offenses for which those charged are to be fingerprinted. 2012 Op. Att'y Gen. No. 12-6.

4-8-30. Confiscation by dog control officer; payment of costs for recovery; euthanasia.

(a) A dangerous dog or vicious dog shall be immediately confiscated by any dog control officer or by a law enforcement officer in the case of any violation of this article. A refusal to surrender a dog subject to confiscation shall be a violation of this article.

(b) The owner of any dog that has been confiscated pursuant to this article may recover such dog upon payment of all reasonable confiscation and housing costs and proof of compliance with the provisions of this article, unless such confiscation is deemed to be in error by a dog control officer, an authority, as defined in Code Section 4-8-23, or a probate court. All fines and all charges for services performed by a law enforcement or dog control officer shall be paid prior to owner recovery of the dog. Criminal prosecution shall not be stayed due to owner recovery or euthanasia of the dog.

(c) In the event the owner has not complied with the provisions of this article within 14 days of the date the dog was confiscated, such dog shall be released to an animal shelter, as such term is defined in Code Section 4-14-2, or euthanized in an expeditious and humane manner. The owner may be required to pay the costs of housing and euthanasia. (Code 1981, § 4-8-30, enacted by Ga. L. 2012, p. 1290, § 4/HB 685; Ga. L. 2014, p. 371, § 3/SB 290.)

The 2014 amendment, effective July 1, 2014, inserted "dog" near the beginning of the first sentence of subsection (a); in subsection (b), in the first sentence, inserted "all" near the middle and added ", unless such confiscation is deemed to be in error by a dog control officer, an authority, as defined in Code Section 4-8-23, or a probate court" at the end; and, in subsection (c), substituted "14 days" for "20 days" near the middle and substituted "shall be released to an animal shelter, as such

term is defined in Code Section 4-14-2, or euthanized in an expeditious and humane manner. The owner" for "shall be destroyed in an expeditious and humane manner and the owner" near the end. See editor's note for applicability.

Editor's notes. — Ga. L. 2014, p. 371, § 6/SB 290, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2014, and shall apply to all violations and confiscations which occur on or after that date."

CHAPTER 11

ANIMAL PROTECTION

Article 1
General Provisions

ARTICLE 1

GENERAL PROVISIONS

4-11-11. Shipment or importation of equines, poultry, livestock, or birds into state without official certificate of veterinary inspection.

(a) It shall be unlawful for any person to ship or import any equines, poultry, livestock, or birds into this state unless accompanied by an official interstate or international certificate of veterinary inspection.

(b) In addition to the provisions of subsection (a) of this Code section, it shall be unlawful to ship or import into this state any other type of animal which the commissioner has determined poses a significant risk of disease to domestic animals or humans within this state unless such animal is accompanied by such certificate. The commissioner shall maintain on the department website a listing of all other types of animals determined to pose a significant risk of disease in accordance with this subsection.

(c) No such certificate shall be required for poultry originating from flocks participating in the National Poultry Improvement Plan administered by the United States Department of Agriculture. (Code 1981, § 4-11-11, enacted by Ga. L. 1986, p. 628, § 1; Ga. L. 2015, p. 1455, § 1/SB 175.)

The 2015 amendment, effective July 1, 2015, designated the previously undesignated language as subsection (a), and rewrote subsection (a), which previously read: "It shall be unlawful for any person to ship any animal, other than equines, livestock, birds, cold-blooded animals, and rodents, into this state for the

purpose of resale unless such animal is accompanied by a U.S. interstate or international certificate of health."; and added subsections (b) and (c).

CHAPTER 12

INJURIES FROM EQUINE OR LLAMA ACTIVITIES

4-12-1. Legislative findings.

JUDICIAL DECISIONS

Horse owner entitled to immunity. — In a suit brought by a rider who was seriously injured after falling from a horse, the trial court properly granted the owner summary judgment because the owner was entitled to civil immunity under the Equine Activities Act, O.C.G.A. § 4-12-1 et seq., since none of the exceptions to immunity outlined in the statute applied and the owner's failure to retighten the girth did not constitute faulty tack under the statute. Holcomb v. Long, 329 Ga. App. 515, 765 S.E.2d 687 (2014).

4-12-3. Immunity from liability for injury or death; exceptions.

JUDICIAL DECISIONS

Horse owner entitled to immunity. — In a suit brought by a rider who was seriously injured after falling from a horse, the trial court properly granted the owner summary judgment because the owner was entitled to civil immunity under the Equine Activities Act, O.C.G.A. § 4-12-1 et seq., since none of the exceptions to immunity outlined in the statute applied and the owner's failure to retighten the girth did not constitute faulty tack under the statute. Holcomb v. Long, 329 Ga. App. 515, 765 S.E.2d 687 (2014).

CHAPTER 14

STERILIZATION OF DOGS AND CATS IN SHELTERS

Sec.

4-14-2. Definitions.

As used in this chapter, the term:

(1) "Animal shelter" means any facility operated by or under contract for the state or any county, municipal corporation, or other political subdivision of the state for the purpose of impounding or harboring seized, stray, homeless, abandoned, or unwanted dogs,

cats, and other animals; any veterinary hospital or clinic operated by a veterinarian or veterinarians which operates for such purpose in addition to its customary purposes; and any facility operated, owned, or maintained by a duly incorporated humane society, animal welfare society, or other nonprofit organization for the purpose of providing for and promoting the welfare, protection, and humane treatment of animals.

(2) "Humane society" means any unincorporated nonprofit organization existing for the purpose of prevention of cruelty to animals.

(3) "Public or private animal refuge" means harborers of unwanted animals of any breed, including crossbreeds, who provide food, shelter, and confinement for a group of dogs, a group of cats, or a combination of dogs and cats.

(4) "Sexually mature animal" means any dog or cat that has reached the age of 180 days or six months or more.

(5) "Sterilization" means rendering a dog or cat unable to reproduce by the surgical removal of its reproductive organs or by rendering a dog unable to reproduce by intratesticular injection approved by the federal government pursuant to 21 U.S.C. Section 360 as of March 7, 2014. (Code 1981, § 4-14-2, enacted by Ga. L. 1994, p. 999, § 1; Ga. L. 2014, p. 371, § 4/SB 290.)

The 2014 amendment, effective July 1, 2014, substituted the present provisions of paragraph (5) for the former provisions, which read: "'Sterilization' means the surgical removal of the reproductive organs of a dog or cat in order to render the animal unable to reproduce." See editor's note for applicability.

Editor's notes. — Ga. L. 2014, p. 371, § 6/SB 290, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2014, and shall apply to all violations and confiscations which occur on or after that date."

TITLE 5

APPEAL AND ERROR

Chap.

CHAPTER 3

APPEALS TO SUPERIOR OR STATE COURT

ARTICLE 1

GENERAL PROVISIONS

5-3-2. Right to appeal from probate courts; exception.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Inability to extend time for appeal. — Pretermitting when the final order occurred, the superior court correctly held that the probate court had no authority to extend the time to appeal beyond the statutorily-prescribed period of 30 days. Accordingly, the probate court's order extending the period beyond that provided for in the statute was of no legal consequence, and the superior court did not err in granting summary judgment. Duncan v. Moreland, 325 Ga. App. 364, 751 S.E.2d 139 (2013).

Parties participating fully in probate court participating in appeal to superior court. — Superior court erred in dismissing an appeal from a probate proceeding under O.C.G.A. § 5-3-2(a) based on the court's finding that appellants, a decedent's mother and cousin, were not parties to the probate proceeding because appellants were treated by the probate court as parties and participated fully in the proceeding. In re Estate of Rogers, 323 Ga. App. 869, 748 S.E.2d 505 (2013).

Cited in Shirley v. Sailors, 329 Ga. App. 850, 766 S.E.2d 201 (2014).

ARTICLE 2

PROCEDURE

5-3-20. Time for filing appeals.

JUDICIAL DECISIONS

County letter was not a "decision". — Letter from a county to a developer advising that proposals would be considered under an amended ordinance limiting the development of private sewer systems was not a "decision" of the county for purposes of triggering the 30-day period to appeal under O.C.G.A. § 5-3-20; therefore, the developer's claim of inverse condemnation never ripened. Mortgage Alliance Corp. v. Pickens County, 294 Ga. 212, 751 S.E.2d 51 (2013).

5-3-29. De novo investigation.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PROCEDURAL ISSUES

General Consideration

Cited in Target Nat'l Bank v. Luffman, 324 Ga. App. 442, 750 S.E.2d 750 (2013); Shirley v. Sailors, 329 Ga. App. 850, 766 S.E.2d 201 (2014).

Procedural Issues

Summary judgment improperly granted to siblings on statute of limitations bar issue. — Trial court erred in granting summary judgment to the siblings on the basis that the challenging sister's claim against the estate seeking an accounting was time-barred because a question of fact remained as to whether the sister was on notice that they had claimed any estate property adversely to the sister; thus, a jury had to decide whether the 10-year bar of O.C.G.A. § 9-3-27(2) began to run before that time. In re Estate of Wade, 331 Ga. App. 535, 771 S.E.2d 214 (2015).

CHAPTER 4

CERTIORARI TO SUPERIOR COURT

5-4-1. When certiorari shall lie; exception.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
WHAT IS JUDICIAL ACTION
2. APPLICATION

General Consideration

Relationship to other laws.

Federal district court did not err in concluding that university professor's procedural due process claim was actionable under 42 U.S.C. § 1983 because the district court reached the plausible conclusion that the state courts may have summarily dismissed the professor's mandamus request without considering the merits thereof; while a writ of certiorari was not available to the professor upon the state court's determination that the termination proceedings were purely administrative, the professor was still entitled to seek a writ of mandamus. Laskar v. Peterson, 771 F.3d 1291 (11th Cir. 2014).

What Is Judicial Action

2. Application

Petition for writ of certiorari was appropriate remedy for homeowners denied building permit. — Mandamus was not the appropriate remedy for homeowners whose building permit had been denied by a city; rather, the homeowners were required to pursue the homeowners' appeal through the filing of a petition for a writ of certiorari, pursuant to Statesboro, Ga., Zoning Ordinance § 1809 and O.C.G.A. § 5-4-1(a); moreover, the homeowners' appeal was untimely under O.C.G.A. § 5-4-6(a). City of Statesboro v. Dickens, 293 Ga. 540, 748 S.E.2d 397 (2013).

5-4-6. Time for application for writ; filing of petition; service of petition and writ.

JUDICIAL DECISIONS

ANALYSIS

TIME FOR FILING APPLICATION

1. IN GENERAL

NOTICE

Time for Filing Application

1. In General

Mandamus not appropriate remedy for homeowners denied building permit. — Mandamus was not the appropriate remedy for homeowners whose building permit had been denied by a city; rather, the homeowners were required to pursue the homeowners' appeal through the filing of a petition for a writ of certiorari, pursuant to Statesboro, Ga., Zoning Ordinance § 1809 and O.C.G.A. § 5-4-1(a); moreover, the homeowners' appeal was untimely under O.C.G.A. § 5-4-6(a). City of Statesboro v. Dickens, 293 Ga. 540, 748 S.E.2d 397 (2013).

Notice

Service must be made diligently. — Although an employee failed to serve the city with a copy of a petition for certiorari within five days as required by O.C.G.A. § 5-4-6(b), the trial court was required to determine whether service was made in a reasonable and diligent manner to effectuate service as quickly as possible. Mangram v. City of Brunswick, 324 Ga. App. 725, 751 S.E.2d 523 (2013).

CHAPTER 5

NEW TRIAL

Article 3

Procedure

ARTICLE 1

GENERAL PROVISIONS

5-5-1. Power of probate, superior, state, juvenile, and City of Atlanta courts.

JUDICIAL DECISIONS

Reconsideration of pretrial ruling on immunity. — Appellate court erred by reversing a trial court order granting the defendant a new trial because the trial court had the inherent authority to reconsider the court's pretrial ruling on the defendant's motion for immunity from criminal prosecution under O.C.G.A. § 16-3-24.2 and to rule otherwise. Hipp v. State, 293 Ga. 415, 746 S.E.2d 95 (2013).

ARTICLE 2

GROUNDS

JUDICIAL DECISIONS

When jury charge is based on unconstitutional statute.

Although a father's motion seeking relief from a child support order was styled as a J.N.O.V., and there had been no jury verdict, the trial court had plenary authority to consider it as a motion for new trial under O.C.G.A. § 5-5-20 or O.C.G.A. § 5-5-21, or a motion to set aside the judgment, based on the substance of the motion. Wheeler v. Akins, 327 Ga. App. 830, 761 S.E.2d 383 (2014).

5-5-20. Verdict contrary to evidence and justice.

JUDICIAL DECISIONS

Analysis

General Consideration

Duty of trial judge to exercise discretion.

In a murder case, the record indicated that, contrary to the defendant's contention, the trial court was aware of and exercised the court's discretion to weigh the evidence in the court's consideration of the defendant's motion for new trial on the general grounds under O.C.G.A. §§ 5-5-20 and 5-5-21 because the trial court specifically responded that the court would not grant a new trial as the thirteenth juror. Allen v. State, 296 Ga. 738, 770 S.E.2d 625 (2015).

Trial court applied incorrect standard.

Trial court failed to apply the proper standard in assessing the weight of the evidence as requested by the defendant in the defendant's motion for new trial, requiring remand for the trial court to apply the proper standard to the general grounds and to exercise the court's discretion to sit as a thirteenth juror pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21. White v. State, 293 Ga. 523, 753 S.E.2d 115 (2013).

Although the evidence was sufficient to convict the defendant as a party of sexual exploitation of children, aggravated sodomy, child molestation, and first degree cruelty to children, the judgment was vacated because the successor judge erred in denying the defendant's motion for a new trial as there was no evidence that the successor judge reviewed the evidence under the appropriate discretionary standard in determining whether the verdict was against the great weight of the evidence or offended the principles of justice and equity. Wiggins v. State, 330 Ga. App. 205, 767 S.E.2d 798 (2014).

Cited in Hipp v. State, 293 Ga. 415, 746 S.E.2d 95 (2013); Gordon v. State, 329 Ga. App. 2, 763 S.E.2d 357 (2014); State v. Jackson, 295 Ga. 825, 764 S.E.2d 395 (2014); Chadwick v. Brazell, 331 Ga. App. 373, 771 S.E.2d 75 (2015).

Application

1. In General

When motion for new trial denied.

Specific reference to defendant's general grounds argument, coupled with the trial court's statements concerning the nature and quantum of the evidence, established that the trial court did, in fact, consider whether the verdict was contrary to or against the weight of the evidence under the proper legal standard, and the trial court did fulfill its role to sit as the thirteenth juror when it denied defendant's motion for a new trial. Sellers v. State, 325 Ga. App. 837, 755 S.E.2d 232 (2014).

Appeal from Denial of New Trial

Supreme Court does not have discretion to grant new trial, etc.

Because the defendant failed to seek a new trial on the general grounds under O.C.G.A. §§ 5-5-20 and 5-5-21, that the verdict was against the weight of the evidence and contrary to the principles of justice and equity, but rather sought a new trial on the grounds of arguments made at trial, the appellate court could not address these grounds. Slaton v. State, 296 Ga. 122, 765 S.E.2d 332 (2014).

Defendant could challenge the sufficiency of the evidence, etc.

Because two witnesses heard the defendant threaten to use a gun moments prior to the shooting, and eyewitnesses saw the defendant shoot the victim, the evidence was sufficient to convict the defendant of malice murder and other crimes in connection with the shooting death of the victim, and the trial court did not err when the court denied the defendant's motion for new trial. Batten v. State, 295 Ga. 442, 761 S.E.2d 70 (2014).

Denial of defendant's motion for new trial was reversed, etc.

Although the trial court exercised the court's discretion as the thirteenth juror to assess the credibility of at least one witness, the court failed to properly fulfill the court's affirmative statutory duty to independently weigh the trial evidence and identify any offending testimony. It was incumbent upon the trial court to then examine and weigh the remaining evidence and independently consider whether the jury's verdict was contrary to the evidence or was against the weight of the evidence. State v. Reid, 331 Ga. App. 275, 770 S.E.2d 665 (2015).

Trial court erred by denying the appel-

Appeal from Denial of New Trial (Cont'd)

lant's motion for a new trial because the motion hearing transcript clearly showed that the appellant requested the trial court to exercise the court's discretion to review the evidence as a thirteenth juror, but in the court's order denying the motion, the trial court stated that, "The testimony and the other evidence introduced at trial was sufficient for a rational trier of fact to find appellant guilty beyond a reasonable doubt," which was not the proper standard of review. Gomillion v. State, 296 Ga. 678, 769 S.E.2d 914 (2015).

Defendant was entitled to a new trial because the order denying the defendant's motion for a new trial made only the legal determination that the evidence was sufficient under Jackson v. Virginia, and did not show that the successor judge exercised discretion, weighed evidence, and acted as the thirteenth juror in determining whether the verdict was against the great weight of the evidence or offended the principles of justice and equity. Wiggins v. State, 330 Ga. App. 205, 767 S.E.2d 798 (2014).

5-5-21. Verdict against weight of evidence.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION
APPEAL OR CERTIORARI FROM DENIAL OF NEW TRIAL

General Consideration

Duty upon trial judge to exercise discretion.

Trial court failed to apply the proper standard in assessing the weight of the evidence as requested by the defendant in the defendant's motion for new trial, requiring remand for the trial court to apply the proper standard to the general grounds and to exercise the court's discretion to sit as a thirteenth juror pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21. White v. State, 293 Ga. 523, 753 S.E.2d 115 (2013).

In a murder case, the record indicated that, contrary to the defendant's contention, the trial court was aware of and exercised the court's discretion to weigh the evidence in the court's consideration of the defendant's motion for new trial on the general grounds under O.C.G.A. §§ 5-5-20 and 5-5-21 because the trial court specifically responded that the court would not grant a new trial as the thirteenth juror. Allen v. State, 296 Ga. 738, 770 S.E.2d 625 (2015).

Appellate court vacated the trial court's decision denying the defendant's motion for new trial because the record failed to indicate that the trial court fulfilled the court's duty of exercising the court's discretion under the applicable standard set forth in O.C.G.A. § 5-5-21. Gordon v. State, 329 Ga. App. 2, 763 S.E.2d 357 (2014).

Trial court applied incorrect standard. — Although the evidence was sufficient to convict the defendant as a party of sexual exploitation of children, aggravated sodomy, child molestation, and first degree cruelty to children, the judgment was vacated because the successor judge erred in denying the defendant's motion for a new trial as there was no evidence that the successor judge reviewed the evidence under the appropriate discretionary standard in determining whether the verdict was against the great weight of the evidence or offended the principles of justice and equity. Wiggins v. State, 330 Ga. App. 205, 767 S.E.2d 798 (2014).

Role of court as thirteenth juror. — Although the trial court exercised the court's discretion as the thirteenth juror to assess the credibility of at least one witness, the court failed to properly fulfill the court's affirmative statutory duty to independently weigh the trial evidence

and identify any offending testimony. It was incumbent upon the trial court to then examine and weigh the remaining evidence and independently consider whether the jury's verdict was contrary to the evidence or was against the weight of the evidence. State v. Reid, 331 Ga. App. 275, 770 S.E.2d 665 (2015).

Although a father's motion seeking relief from a child support order was styled as a JNOV, and there had been no jury verdict, the trial court had plenary authority to consider it as a motion for new trial under O.C.G.A. § 5-5-20 or O.C.G.A. § 5-5-21, or a motion to set aside the judgment, based on the substance of the motion. Wheeler v. Akins, 327 Ga. App. 830, 761 S.E.2d 383 (2014).

Cited in State v. Jackson, 295 Ga. 825, 764 S.E.2d 395 (2014); Chadwick v. Brazell, 331 Ga. App. 373, 771 S.E.2d 75 (2015).

Application

Distinction between legally insufficient evidence and verdict against weight of evidence.

Trial court's review of the evidence under O.C.G.A. § 5-5-21 differs from its review of the evidence on a motion for a directed verdict under O.C.G.A. § 17-9-1. In the latter case, the trial court has a duty to grant a directed verdict of acquittal when there is no conflict in the evidence and it clearly demands a verdict of acquittal as a matter of law. Lavertu v. State, 325 Ga. App. 709, 754 S.E.2d 663 (2014).

When some evidence supports verdict.

Trial court did not err in denying DUI defendant's motion for new trial under O.C.G.A. § 5-5-21 based on the lack of definitive evidence of intoxication from field sobriety tests and the defendant's acquittal on the charge of failure to maintain a lane because the defendant's blood alcohol level was 0.159 and two or three empty airplane-size vodka bottles were in the defendant's car. Lavertu v. State, 325 Ga. App. 709, 754 S.E.2d 663 (2014).

Insufficient evidence of asportation for kidnapping conviction. — Defendant's conviction for kidnapping required reversal because the movement of the victim from one bedroom to another did not further isolate the victim or decrease the potential for rescue, thereby posing no significant danger to the victim independent of the danger posed by the sexual assault and rape; thus, the evidence of asportation was insufficient. Sellers v. State, 325 Ga. App. 837, 755 S.E.2d 232 (2014).

Denial of motion for new trial proper in shoplifting case. — Trial court did not abuse the court's discretion by denying the defendant's motion for a new trial with regard to the defendant's trial for felony shoplifting because the testimony of the store's loss prevention officer established each element of the crime and provided sufficient evidence to support the conviction. Parham v. State, 320 Ga. App. 676, 739 S.E.2d 135 (2013).

Appeal or Certiorari From Denial of New Trial

Supreme Court does not have discretion to grant new trial, etc.

Because the defendant failed to seek a new trial on the general grounds under O.C.G.A. §§ 5-5-20 and 5-5-21, that the verdict was against the weight of the evidence and contrary to the principles of justice and equity, but rather sought a new trial on the grounds of arguments made at trial, the appellate court could not address these grounds. Slaton v. State, 296 Ga. 122, 765 S.E.2d 332 (2014).

Appellate court cannot set aside verdict on general grounds trial judge could have relied upon.

Because two witnesses heard the defendant threaten to use a gun moments prior to the shooting, and eyewitnesses saw the defendant shoot the victim, the evidence was sufficient to convict the defendant of malice murder and other crimes in connection with the shooting death of the victim, and the trial court did not err when the court denied the defendant's motion for new trial. Batten v. State, 295 Ga. 442, 761 S.E.2d 70 (2014).

Denial of motion for new trial improper. — Trial court erred by denying the appellant's motion for a new trial because the motion hearing transcript clearly showed that the appellant requested the trial court to exercise the court's discretion to review the evidence

Appeal or Certiorari From Denial of New Trial (Cont'd)

as a thirteenth juror, but in the court's order denying the motion, the trial court stated that, "The testimony and the other evidence introduced at trial was sufficient for a rational trier of fact to find appellant guilty beyond a reasonable doubt," which was not the proper standard of review. Gomillion v. State, 296 Ga. 678, 769 S.E.2d 914 (2015).

Defendant was entitled to a new trial because the order denying the defendant's motion for a new trial made only the legal determination that the evidence was sufficient under Jackson v. Virginia, 443 U.S. 307 (1979), and did not show that the successor judge exercised discretion, weighed evidence, and acted as the thirteenth juror in determining whether the verdict was against the great weight of the evidence or offended the principles of justice and equity. Wiggins v. State, 330 Ga. App. 205, 767 S.E.2d 798 (2014).

5-5-23. Newly discovered evidence.

JUDICIAL DECISIONS

ANALYSIS

Extraordinary Motions Under Section

Trial court did not abuse discretion in granting extraordinary motion for new trial. — Trial court did not abuse its discretion in granting plaintiffs' extraordinary motion for new trial based on an auto company's misleading discovery responses with regard to liability insurance because they acted with due diligence to raise their claim that the jury should have been qualified as to the auto company's insurers and the failure to do so raised an unrebutted presumption that they were materially harmed. Ford Motor Co. v. Conley, 294 Ga. 530, 757 S.E.2d 20 (2014).

Newly Discovered Evidence

3. Application

Denial of a motion for new trial not abuse of discretion.

Trial court did not abuse the court's discretion in denying the defendant's motion for a new trial based on newly discovered evidence as although the state discovered, following the convictions for attempted child molestation, that the Internet posting presented to the jury was not the posting to which the defendant responded, the court determined that the defendant had knowledge of the correct posting prior to trial and that, even if not, the correct posting was not so material as to produce a different result. Muse v. State, 323 Ga. App. 779, 748 S.E.2d 136 (2013).

Trial court did not abuse the court's discretion by denying a mother's motion for a new trial based on newly discovered evidence with regard to a custody modification following the mother voluntarily giving up custody because there was no affidavit as to the mother's mental condition attached to the motion, and the fact that the father could be deployed for an extensive period was clearly contemplated in the court's final order and incorporated parenting plan. Carr-MacArthur v. Carr, 296 Ga. 30, 764 S.E.2d 840 (2014).

Denial of motion proper.

Trial court did not err in denying the defendant's extraordinary motion for a new trial as the defendant could have moved to conduct DNA testing prior to trial and would have discovered that DNA on the gloves did not match the defendant, but rather the codefendant, and the defendant was thus unable to show that the delay in obtaining evidence was not caused by a lack of due diligence as required in an extraordinary motion for new trial. Bharadia v. State, 326 Ga. App. 827, 755 S.E.2d 273 (2014).

5-5-24. Error in instructions; objection required in civil cases; requested instructions; review of charges involving substantial error.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Lamar v. All Am. Quality Foods, Inc., 323 Ga. App. 572, 746 S.E.2d 665 (2013); Pampattiwar v. Hinson, 326 Ga. App. 163, 756 S.E.2d 246 (2014).

Jury Charge

3. Application

Charge on suicide in medical malpractice action. — In a medical malpractice suit, the complained-of charge did not amount to a substantial error as a matter of law because the defendants failed to object to the charge and, in considering the charge as a whole, the instruction that if suicide was a reasonably foreseeable consequence of the defendants' negligent conduct, legal causal connection between that conduct and the injury was not broken and was not an erroneous charge prejudicial to the defendants. Ga. Clinic, P.C. v. Stout, 323 Ga. App. 487, 747 S.E.2d 83 (2013).

5-5-25. Other grounds.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Hipp v. State, 293 Ga. 415, 746 S.E.2d 95 (2013).

ARTICLE 3

PROCEDURE

5-5-40. Time of motion for new trial generally; amendments; extension of time for filing transcript; time of hearing; priority to cases in which death penalty imposed; appeal not limited to grounds urged; new trial on court's own motion.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Tolling. — Time period for filing a notice of appeal is not tolled by an untimely motion for new trial. Dodson v. State, 292 Ga. 790, 741 S.E.2d 639 (2013).

Motion

2. Time for Filing

Applications for new trial must be filed within 30 days, etc.

Because neither the original court-ordered parenting plan nor the two subsequent orders amending the plan constituted a final judgment, and the determination of child custody became final only when the final judgment and decree in the divorce case was entered, the wife's motion for new trial, although it obviously referenced the bench trial on the child custody issues, was timely filed within 30 days of the date of the final judgment in the divorce case. Hoover v. Hoover, 295 Ga. 132, 757 S.E.2d 838 (2014).

From entry of sentence upon convicted defendant.

When a trial court issued a child support order on February 14, 2012, and the father filed a motion for relief on February 28, 2012, the father's motion (although incorrectly styled a motion for JNOV) was timely as a new trial motion under O.C.G.A. § 5-5-40; the motion was also timely because, in DeKalb County, the January term of court ran from the first Monday in January until the first Monday in March, pursuant to O.C.G.A. § 15-6-3(37). Wheeler v. Akins, 327 Ga. App. 830, 761 S.E.2d 383 (2014).

Untimely motion for new trial is void and does not operate to toll the time, etc.

Defendant's motion for new trial filed more than 30 days after the entry of judgment was untimely under O.C.G.A. § 5-5-40(a), void, and did not toll the 30-day time to file a notice of appeal provided by O.C.G.A. § 5-6-38(a). Because the defendant failed to show good cause for the untimely motion, it could not be construed as an extraordinary motion under O.C.G.A. § 5-5-41(b), and even if it were so construed, the defendant did not follow the discretionary appeal procedure of O.C.G.A. § 5-6-35. Davis v. State, 330 Ga. App. 711, 769 S.E.2d 133 (2015).

Application

Qualification of jurors. — Trial court did not abuse its discretion in granting plaintiffs' extraordinary motion for new trial based on an auto company's misleading discovery responses with regard to liability insurance because they acted with due diligence to raise their claim that the jury should have been qualified as to the auto company's insurers and the failure to do so raised an unrebutted presumption that they were materially harmed. Ford Motor Co. v. Conley, 294 Ga. 530, 757 S.E.2d 20 (2014).

5-5-41. Requirements as to extraordinary motions for new trial generally; notice of filing of motion; limitations as to number of extraordinary motions in criminal cases; DNA testing.

(a) When a motion for a new trial is made after the expiration of a 30 day period from the entry of judgment, some good reason must be shown why the motion was not made during such period, which reason shall be judged by the court. In all such cases, 20 days' notice shall be given to the opposite party.

(b) Whenever a motion for a new trial has been made within the 30 day period in any criminal case and overruled or when a motion for a new trial has not been made during such period, no motion for a new trial from the same verdict or judgment shall be made or received

unless the same is an extraordinary motion or case; and only one such extraordinary motion shall be made or allowed.

(c)(1) Subject to the provisions of subsections (a) and (b) of this Code section, a person convicted of a felony may file a written motion before the trial court that entered the judgment of conviction in his or her case for the performance of forensic deoxyribonucleic acid (DNA) testing.

(2) The filing of the motion as provided in paragraph (1) of this subsection shall not automatically stay an execution.

(3) The motion shall be verified by the petitioner and shall show or provide the following:

(A) Evidence that potentially contains deoxyribonucleic acid (DNA) was obtained in relation to the crime and subsequent indictment, which resulted in his or her conviction;

(B) The evidence was not subjected to the requested DNA testing because the existence of the evidence was unknown to the petitioner or to the petitioner's trial attorney prior to trial or because the technology for the testing was not available at the time of trial;

(C) The identity of the perpetrator was, or should have been, a significant issue in the case;

(D) The requested DNA testing would raise a reasonable probability that the petitioner would have been acquitted if the results of DNA testing had been available at the time of conviction, in light of all the evidence in the case;

(E) A description of the evidence to be tested and, if known, its present location, its origin and the date, time, and means of its original collection;

(F) The results of any DNA or other biological evidence testing that was conducted previously by either the prosecution or the defense, if known;

(G) If known, the names, addresses, and telephone numbers of all persons or entities who are known or believed to have possession of any evidence described by subparagraphs (A) through (F) of this paragraph, and any persons or entities who have provided any of the information contained in petitioner's motion, indicating which person or entity has which items of evidence or information; and

(H) The names, addresses, and telephone numbers of all persons or entities who may testify for the petitioner and a description of the subject matter and summary of the facts to which each person or entity may testify.

(4) The petitioner shall state:

(A) That the motion is not filed for the purpose of delay; and

(B) That the issue was not raised by the petitioner or the requested DNA testing was not ordered in a prior proceeding in the courts of this state or the United States.

(5) The motion shall be served upon the district attorney and the Attorney General. The state shall file its response, if any, within 60 days of being served with the motion. The state shall be given notice and an opportunity to respond at any hearing conducted pursuant to this subsection.

(6)(A) If, after the state files its response, if any, and the court determines that the motion complies with the requirements of paragraphs (3) and (4) of this subsection, the court shall order a hearing to occur after the state has filed its response, but not more than 90 days from the date the motion was filed.

(B) The motion shall be heard by the judge who conducted the trial that resulted in the petitioner's conviction unless the presiding judge determines that the trial judge is unavailable.

(C) Upon request of either party, the court may order, in the interest of justice, that the petitioner be at the hearing on the motion. The court may receive additional memoranda of law or evidence from the parties for up to 30 days after the hearing.

(D) The petitioner and the state may present evidence by sworn and notarized affidavits or testimony; provided, however, any affidavit shall be served on the opposing party at least 15 days prior to the hearing.

(E) The purpose of the hearing shall be to allow the parties to be heard on the issue of whether the petitioner's motion complies with the requirements of paragraphs (3) and (4) of this subsection, whether upon consideration of all of the evidence there is a reasonable probability that the verdict would have been different if the results of the requested DNA testing had been available at the time of trial, and whether the requirements of paragraph (7) of this subsection have been established.

(7) The court shall grant the motion for DNA testing if it determines that the petitioner has met the requirements set forth in paragraphs (3) and (4) of this subsection and that all of the following have been established:

(A) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion;

(B) The evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect;

(C) The evidence was not tested previously or, if tested previously, the requested DNA test would provide results that are reasonably more discriminating or probative of the identity of the perpetrator than prior test results;

(D) The motion is not made for the purpose of delay;

(E) The identity of the perpetrator of the crime was a significant issue in the case;

(F) The testing requested employs a scientific method that has reached a scientific state of verifiable certainty such that the procedure rests upon the laws of nature; and

(G) The petitioner has made a prima facie showing that the evidence sought to be tested is material to the issue of the petitioner's identity as the perpetrator of, or accomplice to, the crime, aggravating circumstance, or similar transaction that resulted in the conviction.

(8) If the court orders testing pursuant to this subsection, the court shall determine the method of testing and responsibility for payment for the cost of testing, if necessary, and may require the petitioner to pay the costs of testing if the court determines that the petitioner has the ability to pay. If the petitioner is indigent, the cost shall be paid from the fine and bond forfeiture fund as provided in Article 3 of Chapter 21 of Title 15.

(9) If the court orders testing pursuant to this subsection, the court shall order that the evidence be tested by the Division of Forensic Sciences of the Georgia Bureau of Investigation. In addition, the court may also authorize the testing of the evidence by a laboratory that meets the standards of the DNA advisory board established pursuant to the DNA Identification Act of 1994, Section 14131 of Title 42 of the United States Code, to conduct the testing. The court shall order that a sample of the petitioner's DNA be submitted to the Division of Forensic Sciences of the Georgia Bureau of Investigation and that the DNA analysis be stored and maintained by the bureau in the DNA data bank.

(10) If a motion is filed pursuant to this subsection the court shall order the state to preserve during the pendency of the proceeding all evidence that contains biological material, including, but not limited to, stains, fluids, or hair samples in the state's possession or control.

(11) The result of any test ordered under this subsection shall be fully disclosed to the petitioner, the district attorney, and the Attorney General.

(12) The judge shall set forth by written order the rationale for the grant or denial of the motion for new trial filed pursuant to this subsection.

(13) The petitioner or the state may appeal an order, decision, or judgment rendered pursuant to this Code section. (Orig. Code 1863, § 3645; Code 1868, § 3670; Ga. L. 1873, p. 47, § 1; Code 1873, § 3721; Code 1882, § 3721; Civil Code 1895, § 5487; Penal Code 1895, § 1064; Civil Code 1910, § 6092; Penal Code 1910, § 1091; Code 1933, § 70-303; Ga. L. 2003, p. 247, § 1; Ga. L. 2011, p. 264, § 1-2/SB 80; Ga. L. 2012, p. 775, § 5/HB 942; Ga. L. 2015, p. 693, § 3-4/HB 233.)

The 2015 amendment, effective July 1, 2015, substituted "fine and bond forfeiture fund as provided in Article 3 of Chapter 21" for "fine and forfeiture fund as provided in Article 3 of Chapter 5" at the end of paragraph (c)(8). See editor's note for applicability.

Editor's notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure."

JUDICIAL DECISIONS

General Consideration

Good reason must be shown to justify motion made after time prescribed.

Defendant's motion for new trial filed more than 30 days after the entry of judgment was untimely under O.C.G.A. § 5-5-40(a), void, and did not toll the 30-day time to file a notice of appeal provided by O.C.G.A. § 5-6-38(a). Because the defendant failed to show good cause for the untimely motion, it could not be construed as an extraordinary motion under O.C.G.A. § 5-5-41(b), and even if it were so construed, the defendant did not follow the discretionary appeal procedure of O.C.G.A. § 5-6-35. Davis v. State, 330 Ga. App. 711, 769 S.E.2d 133 (2015).

Cited in Nazario v. State, 293 Ga. 480, 746 S.E.2d 109 (2013).

Application

2. When Extraordinary Motion Proper

Juror qualification. — Trial court did not abuse its discretion in granting plaintiffs' extraordinary motion for new trial based on an auto company's misleading discovery responses with regard to liability insurance because they acted with due diligence to raise their claim that the jury should have been qualified as to the auto company's insurers and the failure to do so raised an unrebutted presumption that they were materially harmed. Ford Motor Co. v. Conley, 294 Ga. 530, 757 S.E.2d 20 (2014).

5-5-50. Standard for review by appellate court of first grant of new trial.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in State v. Oliver, 326 Ga. App. 759, 755 S.E.2d 293 (2014).

CHAPTER 6

CERTIORARI AND APPEALS TO APPELLATE COURTS GENERALLY

Article 1

General Provisions

Sec.

ARTICLE 1

GENERAL PROVISIONS

5-6-2. Disposition of transcript in appellate court.

JUDICIAL DECISIONS

Cited in Sentinel Offender Svcs., LLC v. Glover, No. S14A1271, S14X1272, 2014 Ga. LEXIS 940 (Nov. 24, 2014).

5-6-4. Bill of costs; payment of costs; exceptions to payment; prerequisite to receipt of application for appeal or brief by clerk.

(a) The bill of costs for every application to the Supreme Court for a writ of certiorari or for applications for appeals filed in the Supreme Court or the Court of Appeals or appeals to the Supreme Court or the Court of Appeals shall be $80.00 in criminal cases and in habeas corpus cases for persons whose liberty is being restrained by virtue of a sentence imposed against them by a state court and $300.00 in all other civil cases. The costs shall be paid by counsel for the applicant or appellant at the time of the filing of the application or, in the case of

direct appeals, at the time of the filing of the original brief of the appellant. In those cases in which the writ of certiorari or an application for appeal is granted, there shall be no additional costs.

(b) Costs shall not be required when at the time the same are due:

(1) The pro se applicant or pro se appellant is incarcerated at the time of the filing;

(2) Counsel for the applicant or appellant was appointed to represent the defendant by the trial court because of the defendant's indigency; or

(3) The applicant, appellant, or counsel for applicant or appellant files an affidavit of indigency.

(c) The clerk shall be prohibited from receiving the application for appeal or the brief of the appellant unless the costs have been paid or the provisions of subsection (b) of this Code section have been satisfied. (Ga. L. 1921, p. 239, § 1; Code 1933, § 6-1702; Ga. L. 1965, p. 650, § 1; Ga. L. 1982, p. 1186, § 1; Ga. L. 1991, p. 411, § 1; Ga. L. 2009, p. 644, § 1/HB 283; Ga. L. 2014, p. 222, § 1/HB 842.)

The 2014 amendment, effective July 1, 2014, rewrote this Code section.

5-6-10. Transmittal of remittitur to lower court generally.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Lower court could not entertain successive motion for new trial. — Appellate reversal of the trial court's grant of a new trial in a prior appeal from the defendant's murder conviction resolved all pending issues in the case; the trial court therefore erred in entertaining and granting the defendant's newly-filed motion for new trial on different grounds. State v. Jackson, 295 Ga. 825, 764 S.E.2d 395 (2014).

If six judges would affirm and six would not. — In a review of a denial of a motion to suppress, six judges of the Georgia Court of Appeals would have affirmed, and six would not; because there was an equal division, the Court of Appeals should have immediately transferred the case to the Supreme Court of Georgia, pursuant to Ga. Const. 1983, Art. VI, Sec. V, Para. V. The judges' differences of opinion about whether the judgment of the trial court should be set aside as "reversed" or instead as "vacated" were not dispositive. Rodriguez v. State, 295 Ga. 362, 761 S.E.2d 19 (2014).

5-6-13. Granting of supersedeas in cases of contempt.

Law reviews. — For article on domestic relations, see 66 Mercer L. Rev. 65 (2014).

JUDICIAL DECISIONS

Failure to grant requested supersedeas moot. — Mother who was found in contempt for denying a child's father his visitation rights had appealed only the trial court's visitation modification and not the trial court's finding of contempt; therefore, her challenge to the trial court's denial of supersedeas under O.C.G.A. § 5-6-13(a) based on O.C.G.A. § 5-6-34(e) was moot. Weeks v. Weeks, 324 Ga. App. 785, 751 S.E.2d 575 (2013).

ARTICLE 2

APPELLATE PRACTICE

5-6-30. Purpose of article; construction.

JUDICIAL DECISIONS

Liberal construction.

Georgia appellate court is bound by the statutory mandate that the Appellate Practice Act, O.C.G.A. § 5-6-30 et seq., is to be liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case or refusal to consider any points raised therein. Larose v. Bank of Am., N.A., 321 Ga. App. 465, 740 S.E.2d 882 (2013).

Clarification for cross-appeals. — Appellate court erred by dismissing the cross-appeals of the defendants because a cross-appeal that is filed in a timely and otherwise procedurally proper manner need not be factually related to the issues raised in the main appeal; rather, as O.C.G.A. § 5-6-38(a) states, the cross-appeal may involve all errors or rulings adversely affecting the appellees. Sewell v. Cancel, 295 Ga. 235, 759 S.E.2d 485 (2014).

Georgia Supreme Court clarifies that a cross-appeal that is filed in a timely and otherwise procedurally proper manner need not be factually related to the issues raised in the main appeal; rather, the cross-appeal may involve all errors or rulings adversely affecting the appellee and, to the extent Fulton v. Pilon, 199 Ga. App. 861, 406 S.E.2d 517 (1991), and other cases have required otherwise, those cases are overruled. Sewell v. Cancel, 295 Ga. 235, 759 S.E.2d 485 (2014).

Dismissal of appeal was improper. — Georgia Court of Appeals had jurisdiction over a case wherein a purchaser appealed a trial court's grant of summary judgment to other defendants and dismissed them, which occurred prior to settling with the sellers as the purchaser did not voluntarily dismiss the remaining defendants to obtain a directly appealable final order and if the parties had not reached a settlement and proceeded to trial, the purchaser would have been able to directly appeal the judgment resulting from the trial. O'Dell v. Mahoney, 324 Ga. App. 360, 750 S.E.2d 689 (2013).

Cited in Terrell County Bd. of Tax Assessors v. Goolsby, 324 Ga. App. 535, 751 S.E.2d 158 (2013).

5-6-34. Judgments and rulings deemed directly appealable; procedure for review of judgments, orders, or decisions not subject to direct appeal; scope of review; hearings in criminal cases involving a capital offense for which death penalty is sought; appeals involving nonmonetary judgments in child custody cases.

Law reviews. — For annual survey on trial practice and procedure, see 65 Mercer L. Rev. 277 (2013).

JUDICIAL DECISIONS

Analysis

General Consideration

1. Constitutionality and Purpose of Section

Questions decided by appellate court binding as law of case. — Parent could not raise various enumerations of error in the parent's appeal of a custody modification decision because the same issues had been raised in the prior appeals. Gilchrist v. Gilchrist, 323 Ga. App. 555, 747 S.E.2d 75 (2013).

Appellate court may consider orders that were entered prior to or contemporaneously with the judgment being appealed, O.C.G.A. § 5-6-34(d), but judgments cannot be considered on appeal if rendered subsequent to the judgment appealed. Jaycee Atlanta Dev., LLC v. Providence Bank, 330 Ga. App. 322, 765 S.E.2d 536 (2014).

2. Construction in General

Clarification for cross-appeals. — Georgia Supreme Court clarifies that a cross-appeal that is filed in a timely and otherwise procedurally proper manner need not be factually related to the issues raised in the main appeal; rather, the cross-appeal may involve all errors or rulings adversely affecting the appellee and, to the extent Fulton v. Pilon, 199 Ga. App. 861, 406 S.E.2d 517 (1991), and other cases have required otherwise, those cases are overruled. Sewell v. Cancel, 295 Ga. 235, 759 S.E.2d 485 (2014).

Order limiting lead counsel's pro hac vice status. — Appeal of an order limiting lead counsel's pro hac vice status and designating two local counsel was dismissed because there was no direct appeal available from the order since the trial court did not disqualify lead counsel and, instead, only limited participation in the case. Fein v. Chenault, 330 Ga. App. 222, 767 S.E.2d 766 (2014).

Cited in Metro Atlanta Task Force for the Homeless, Inc. v. Premium Funding Solutions, LLC, 321 Ga. App. 100, 741 S.E.2d 225 (2013); Sifuentes v. State, 293 Ga. 441, 746 S.E.2d 127 (2013); Miller v.

GGNSC Atlanta, LLC, 323 Ga. App. 114, 746 S.E.2d 680 (2013); Williamson v. Williamson, 293 Ga. 721, 748 S.E.2d 679 (2013); Deal v. Coleman, 294 Ga. 170, 751 S.E.2d 337 (2013); Ford Motor Co. v. Conley, 294 Ga. 530, 757 S.E.2d 20 (2014); Bibb County v. Monroe County, 294 Ga. 730, 755 S.E.2d 760 (2014); Beringer v. Emory, 326 Ga. App. 260, 756 S.E.2d 329 (2014); Goodrich v. Bank of Am., N.A., 329 Ga. App. 41, 762 S.E.2d 628 (2014); BDO USA, LLP v. Coe, 329 Ga. App. 79, 763 S.E.2d 742 (2014); Park v. Bailey, 329 Ga. App. 569, 765 S.E.2d 721 (2014); Sentinel Offender Svcs., LLC v. Glover, No. S14A1271, S14X1272, 2014 Ga. LEXIS 940 (Nov. 24, 2014).

What Are Final, Appealable Judgments

Appellate court had jurisdiction over appeal involving multiple parties. — Georgia Court of Appeals had jurisdiction over a case wherein a purchaser appealed a trial court's grant of summary judgment to other defendants and dismissed them, which occurred prior to settling with the sellers as the purchaser did not voluntarily dismiss the remaining defendants to obtain a directly appealable final order and if the parties had not reached a settlement and proceeded to trial, the purchaser would have been able to directly appeal the judgment resulting from the trial. O'Dell v. Mahoney, 324 Ga. App. 360, 750 S.E.2d 689 (2013).

Child custody order in divorce case not a final judgment. — Because neither the original court-ordered parenting plan nor the two subsequent orders amending the plan constituted a final judgment, and the determination of child custody became final only when the final judgment and decree in the divorce case was entered, the wife's motion for new trial, although the motion obviously referenced the bench trial on the child custody issues, was timely filed within 30 days of the date of the final judgment in the divorce case. Hoover v. Hoover, 295 Ga. 132, 757 S.E.2d 838 (2014).

Trial court's order denying a motion to recuse, etc.

Because all the salient dates, including the filing of the action, the issuance of the order sought to be appealed, and the filing of the notice of appeal, occurred prior to the effective date of the amendment to O.C.G.A. § 5-6-34 in 2013, a proper retroactivity analysis and its application did not provide a basis for dismissing the mother's appeal; however, even under the former version of this statute, there was no right of direct appeal from the recusal order of the judge as the order denying the motion to recuse did not deal with which parent had custody. Murphy v. Murphy, 295 Ga. 376, 761 S.E.2d 53 (2014).

Rulings Not Appealable Without Certificate

1. In General

Order denying motion to recuse trial judge. — Because review after entry of final judgment of orders denying motions to recuse can protect the parties' interests adequately, such orders are not appealable as collateral orders as to hold otherwise ignores the explicit language of O.C.G.A. § 5-6-34(b); thus, the Georgia Court of Appeals overrules Braddy v. State, 316 Ga. App. 292, 729 SE2d 461 (2012). Murphy v. Murphy, 322 Ga. App. 829, 747 S.E.2d 21 (2013).

Mother's appeal of an order denying the mother's motion to recuse the trial court judge in a change of custody case brought by the father was dismissed because the order did not award, refuse to change, or modify child custody; thus, it was not appealable under O.C.G.A. § 5-6-34(a)(11) and the appellate court lacked jurisdiction. Murphy v. Murphy, 322 Ga. App. 829, 747 S.E.2d 21 (2013).

Summary Judgments

2. Denials

Appealability of denial of summary judgment.

Although exclusion of evidence resulted in reversible error and a remand for a new trial in a matter involving a challenge to a promotional examination as the denial of summary judgment on an issue was enumerated as error, the issue was addressed on appeal. City of Atlanta v. Bennett, 322

Summary Judgments (Cont'd)
2. Denials (Cont'd)

Ga. App. 726, 746 S.E.2d 198 (2013).

Clarification for cross-appeals. — Appellate court erred by dismissing the cross-appeals of the defendants because a cross-appeal that is filed in a timely and otherwise procedurally proper manner need not be factually related to the issues raised in the main appeal; rather, as O.C.G.A. § 5-6-38(a) states, the cross-appeal may involve all errors or rulings adversely affecting appellees. Sewell v. Cancel, 295 Ga. 235, 759 S.E.2d 485 (2014).

Injunctions and Restraining Orders

Jurisdiction for appeal was proper.

Because, in addition to appointing a receiver/special master, a trial court issued an immediate, preliminary and permanent injunction against two partners from taking certain business actions, O.C.G.A. § 5-6-34(a)(4) allowed a direct appeal of the order. Petrakopoulos v. Vranas, 325 Ga. App. 332, 750 S.E.2d 779 (2013).

Continuance of restraining order is appealable, etc.

Trial court did not abuse the court's discretion by dissolving a temporary restraining order and allowing a bank to proceed with the bank's foreclosure action as it was within the trial court's discretion to condition the extension of injunctive relief upon the mortgagor's placement of an amount of money in escrow reflecting past-due payments on the mortgage, which the mortgagor declined to do. Morgan v. U. S. Bank Nat'l Ass'n, 322 Ga. App. 357, 745 S.E.2d 290 (2013).

Injunctive relief on inmate's execution unjustified. — Trial court erred by granting injunctive relief to an inmate prohibiting the inmate's execution by unknown drugs or entities involved because the Georgia Supreme Court held that it was not unconstitutional for the State of Georgia to maintain the confidentiality of the names and other identifying information of the persons and entities involved in executions, pursuant to O.C.G.A. § 42-5-36(d), including those who manufacture the drug or drugs to be used. Owens v. Hill, 295 Ga. 302, 758 S.E.2d 794 (2014).

Judgments of Contempt

Direct appeals may be taken from contempt orders, etc.

Appellate court had jurisdiction to consider the prior orders specified in the notice of appeal because O.C.G.A. § 5-6-34(a)(2) expressly authorized a direct appeal from an order of contempt. Allison v. Wilson, 320 Ga. App. 629, 740 S.E.2d 355 (2013).

No jurisdiction to consider contempt order.

Because the husband never filed the application for discretionary appeal of the June 27th contempt order finding that the husband failed to comply with the terms of the parties' divorce decree, that appeal was dismissed; thus, the husband's current appeal, to the extent that it challenged the previously appealed June 27th contempt order, was dismissed. Massey v. Massey, 294 Ga. 163, 751 S.E.2d 330 (2013).

Contempt was reviewable even if appellants followed interlocutory procedure. — In an appeal from a contempt order entered in a child custody case, the parent and the parent's counsel were not required to follow the interlocutory appeal procedure, O.C.G.A. § 5-6-34(a)(11), but the court had jurisdiction over the appeal even though the appellants were entitled to follow the direct appeal procedure, pursuant to O.C.G.A. § 5-6-35(j). Murphy v. Murphy, 330 Ga. App. 169, 767 S.E.2d 789 (2014).

Moot Issues

Appeal deemed moot and dismissed.

As the denial of a former director's putative transferee's motion in limine was based on the former evidence code, and the trial would be based on the new evidence code, an interlocutory appeal of the ruling on the motion in limine was moot. Am. Nat'l Holding Corp. v. EMM Credit, LLC, 323 Ga. App. 655, 748 S.E.2d 683 (2013).

Failure to grant requested supersedeas moot. — Mother who was

found in contempt for denying a child's father his visitation rights had appealed only the trial court's visitation modification and not the trial court's finding of contempt; therefore, her challenge to the trial court's denial of supersedeas under O.C.G.A. § 5-6-13(a) based on O.C.G.A. § 5-6-34(e) was moot. Weeks v. Weeks, 324 Ga. App. 785, 751 S.E.2d 575 (2013).

Application

1. In General

Discretionary review when no direct appeal in custody dispute. — Although a trial court's order in a custody dispute between a child's grandmothers was not an order that was subject to direct appeal as the appellate court had granted the paternal grandmother's application for interlocutory appeal when a prior jurisdictional statute was in effect, the court exercised the court's discretion to retain the appeal and review the case on the merits. Barfield v. Butterworth, 323 Ga. App. 156, 746 S.E.2d 819 (2013).

Order denying legitimation. — Appellate court dismissed an alleged biological father's appeal to a trial court's denial of a petition for legitimation because the alleged father was required to file a discretionary application for appeal under O.C.G.A. § 5-6-35(a)(12) and since no such application was filed, the appellate court was without jurisdiction to hear the merits of the appeal. Numanovic v. Jones, 321 Ga. App. 763, 743 S.E.2d 450 (2013).

Order disqualifying counsel. — Because the orders disqualifying appellant attorney from representing the other appellants were interlocutory, not collateral, but the procedures for appealing an interlocutory order were not followed, it was not currently within the appellate court's discretion to consider the disqualification of appellant attorney by direct appeal. Settendown Pub. Util., LLC v. Waterscape Util., LLC, 324 Ga. App. 652, 751 S.E.2d 463 (2013).

5-6-35. Cases requiring application for appeal; requirements for application; exhibits; response; issuance of appellate court order regarding appeal; procedure; supersedeas; jurisdiction of appeal; appeals involving nonmonetary judgments in custody cases.

Law reviews. — For article, "Division of Labor: The Modernization of the Supreme Court of Georgia and Concomitant Workload Reduction Measures in the Court of Appeals," see 30 Ga. St. U.L. Rev. 925 (2014).

JUDICIAL DECISIONS

Analysis

General Consideration

Order limiting lead counsel's pro hac vice status. — Appeal of an order limiting lead counsel's pro hac vice status and designating two local counsel was dismissed because there was no direct appeal available from the order since the trial court did not disqualify lead counsel and, instead, only limited participation in the case. Fein v. Chenault, 330 Ga. App. 222, 767 S.E.2d 766 (2014).

Cited in Elrod v. Sunflower Meadows Dev., LLC, 322 Ga. App. 666, 745 S.E.2d 846 (2013); Williamson v. Williamson, 293 Ga. 721, 748 S.E.2d 679 (2013); Bibb County v. Monroe County, 294 Ga. 730, 755 S.E.2d 760 (2014); Beringer v. Emory,

General Consideration (Cont'd)

326 Ga. App. 260, 756 S.E.2d 329 (2014).

Application

1. In General

Discretionary appeal procedure must be used following denial of extraordinary motion for new trial. — Defendant's motion for new trial filed more than 30 days after the entry of judgment was untimely under O.C.G.A. § 5-5-40(a), void, and did not toll the 30-day time to file a notice of appeal provided by O.C.G.A. § 5-6-38(a). Because the defendant failed to show good cause for the untimely motion, it could not be construed as an extraordinary motion under O.C.G.A. § 5-5-41(b), and even if it were so construed, the defendant did not follow the discretionary appeal procedure of O.C.G.A. § 5-6-35. Davis v. State, 330 Ga. App. 711, 769 S.E.2d 133 (2015).

Appeal from legitimation proceeding, etc.

Appellate court dismissed an alleged biological father's appeal to a trial court's denial of a petition for legitimation because the alleged father was required to file a discretionary application for appeal under O.C.G.A. § 5-6-35(a)(12) and since no such application was filed, the appellate court was without jurisdiction to hear the merits of the appeal. Numanovic v. Jones, 321 Ga. App. 763, 743 S.E.2d 450 (2013).

2. Judgments Concerning Child Custody

Contempt order was reviewable even if appellants followed interlocutory procedure. — In an appeal from a contempt order entered in a child custody case, the parent and the parent's counsel were not required to follow the interlocutory appeal procedure, O.C.G.A. § 5-6-34(a)(11), but the court had jurisdiction over the appeal even though the appellants were entitled to follow the direct appeal procedure, pursuant to O.C.G.A. § 5-6-35(j). Murphy v. Murphy, 330 Ga. App. 169, 767 S.E.2d 789 (2014).

3. Divorce

Jurisdiction of trial court. — Trial court had jurisdiction to grant a divorce, as opposed to the State of New York trial court wherein the wife petitioned for a divorce, because there was some evidence to support the trial court's findings on domicile of the parties, including that the husband was stationed in the military in Georgia, they lived in military housing then purchased a home, and continued to live in that home until their separation. Black v. Black, 292 Ga. 691, 740 S.E.2d 613 (2013).

Appeal of contempt order.

Because the husband never filed the application for discretionary appeal of the June 27th contempt order finding that the husband failed to comply with the terms of the parties' divorce decree, that appeal was dismissed; thus, the husband's current appeal, to the extent that it challenged the previously appealed June 27th contempt order, was dismissed. Massey v. Massey, 294 Ga. 163, 751 S.E.2d 330 (2013).

Enforcement of divorce judgment.

By failing to complain in the application for discretionary review of the provisions of the decree concerning child support, a mother forfeited any appellate review of those provisions, and the Georgia Supreme Court declined to consider that additional enumeration of error. Zekser v. Zekser, 293 Ga. 366, 744 S.E.2d 698 (2013).

5-6-37. Filing and contents of notice of appeal; service of notice upon parties to appeal.

JUDICIAL DECISIONS

ANALYSIS

CONTENT OF NOTICE OF APPEAL

Content of Notice of Appeal

When the notice of appeal did not specify that a transcript of evidence, etc.

In an appeal of a criminal conviction, the appellate court chose to sua sponte reinstate the case to address the appellant's enumerations of error on the merits despite the failure to set forth in the notice of appeal the intention to rely upon a previously transmitted transcript because the court had not yet addressed the issue in a published opinion and used the case to place future appellants on notice that similar procedural errors may result in automatic affirmance of a trial court's decision. Holman v. State, 329 Ga. App. 393, 765 S.E.2d 614 (2014).

Failure to include trial court transcript. — In a breach of contract and quantum meruit case, the appellate court affirmed the trial court's judgment in favor of the appellee because the appellant failed to comply with the requirements of O.C.G.A. § 5-6-37 by providing a trial court transcript, which made the appellate record incomplete and required the trial court judgment to be affirmed. Curry v. Miller, 328 Ga. App. 564, 763 S.E.2d 489 (2014).

5-6-38. Time of filing notice of appeal; cross appeal; record and transcript for cross appeal; division of costs; appeals in capital offense cases for which death penalty is sought.

JUDICIAL DECISIONS

ANALYSIS

Appealable Judgments or Orders

Direct appeals may be taken from contempt orders. — Appellate court had jurisdiction to consider the prior orders specified in the notice of appeal because O.C.G.A. § 5-6-34(a)(2) expressly authorized a direct appeal from an order of contempt. Allison v. Wilson, 320 Ga. App. 629, 740 S.E.2d 355 (2013).

Jurisdiction

Appellate court without jurisdiction.

Because the defendant did not file either a cross-appeal to the state's appeal or a separate notice of appeal regarding the superior court's adverse rulings on the other alleged violations of the statute regarding the presiding judge's allegedly improper questioning of the defendant, the appellate court lacked jurisdiction to consider the defendant's allegations of error arising from the superior court's adverse rulings. State v. Nickerson, 324 Ga. App. 576, 749 S.E.2d 768 (2013).

Clarification for cross-appeals. — Appellate court erred by dismissing the cross-appeals of the defendants because a cross-appeal that is filed in a timely and otherwise procedurally proper manner need not be factually related to the issues raised in the main appeal; rather, as O.C.G.A. § 5-6-38(a) states, the cross-appeal may involve all errors or rulings adversely affecting the appellees. Sewell v. Cancel, 295 Ga. 235, 759 S.E.2d 485 (2014).

Georgia Supreme Court clarifies that a cross-appeal that is filed in a timely and otherwise procedurally proper manner need not be factually related to the issues raised in the main appeal; rather, the cross-appeal may involve all errors or rulings adversely affecting the appellee and, to the extent Fulton v. Pilon, 199 Ga. App. 861, 406 S.E.2d 517 (1991), and other cases have required otherwise, those cases are overruled. Sewell v. Cancel, 295 Ga. 235, 759 S.E.2d 485 (2014).

Filing

3. Premature Filing

Appeal filed while motion for directed verdict or JNOV remained pending. — For purposes of the hospital's cross-appeal, because the trial court had not entered an order addressing and ruling upon the remaining grounds raised in the hospital's motion for a directed verdict or the hospital's motion for a judgment notwithstanding the verdict, it was improper for the appellate court to address those issues on appeal. Dempsey v. Gwinnett Hosp. Sys., 330 Ga. App. 469, 765 S.E.2d 525 (2014).

4. Late Filing

Dismissal for late filing.

Defendant's motion for new trial filed more than 30 days after the entry of judgment was untimely under O.C.G.A. § 5-5-40(a), void, and did not toll the 30-day time to file a notice of appeal provided by O.C.G.A. § 5-6-38(a). Because the defendant failed to show good cause for the untimely motion, it could not be construed as an extraordinary motion under O.C.G.A. § 5-5-41(b), and even if it were so construed, the defendant did not follow the discretionary appeal procedure of O.C.G.A. § 5-6-35. Davis v. State, 330 Ga. App. 711, 769 S.E.2d 133 (2015).

5-6-39. Extensions of time for filing notice of appeal, notice of cross appeal, transcript of evidence, designation of record and other similar motions.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Dismissal for failure to comply.

Defendant's motion for new trial filed more than 30 days after the entry of judgment was untimely under O.C.G.A. § 5-5-40(a), void, and did not toll the 30-day time to file a notice of appeal provided by O.C.G.A. § 5-6-38(a). Because the defendant failed to show good cause for the untimely motion, it could not be construed as an extraordinary motion under O.C.G.A. § 5-5-41(b), and even if it were so construed, the defendant did not follow the discretionary appeal procedure of O.C.G.A. § 5-6-35. Davis v. State, 330 Ga. App. 711, 769 S.E.2d 133 (2015).

Failure to get extension.

Homeowner's appeal in a wrongful foreclosure case was properly dismissed due to the homeowner's failure to file the transcript of the summary judgment proceedings for more than eight months after the deadline provided in O.C.G.A. § 5-6-42; the homeowner's proceeding in forma pauperis, O.C.G.A. § 9-15-2, did not excuse the homeowner's failure to timely obtain the transcript. Ashley v. JP Morgan Chase Bank, N.A., 327 Ga. App. 232, 758 S.E.2d 135 (2014).

Cited in Chernowski v. State, 330 Ga. App. 702, 769 S.E.2d 126 (2015).

Grants of Extensions

1. Notice of Appeal

Authority to grant out of time appeal without specifying order. — Georgia superior court has the authority under O.C.G.A. § 5-6-39(a)(1) and (c) to grant one 30-day extension of the time for filing the notice of appeal, and nothing in that statute requires the court to specify precisely to which order the extension applied. Terrell County Bd. of Tax Assessors v. Goolsby, 324 Ga. App. 535, 751 S.E.2d 158 (2013).

5-6-40. Enumeration of errors.

JUDICIAL DECISIONS

Analysis

General Consideration

Cited in Straus v. Renasant Bank, 326 Ga. App. 271, 756 S.E.2d 340 (2014).

Content and Form of Enumeration

2. Application

Enumerations containing multiple allegations of error and failure to address each enumeration. — In an appeal from contempt orders entered in a child custody case, a parent and the parent's attorney failed to comply with O.C.G.A. § 5-6-40 and Ga. Ct. App. R. 10, 25(a), and 25(c)(1); the brief and enumerations of error were rambling and difficult to follow and those arguments that were unsupported by authority were deemed abandoned. The court considered claims to the extent the court could ascertain the arguments. Murphy v. Murphy, 330 Ga. App. 169, 767 S.E.2d 789 (2014).

5-6-41. Reporting, preparation, and disposition of transcript; correction of omissions or misstatements; preparation of transcript from recollections; filing of disallowed papers; filing of stipulations in lieu of transcript; reporting at party's expense.

JUDICIAL DECISIONS

Analysis

General Consideration

Exclusion of court reporter's audio recording of plea hearing. — Trial court did not abuse the court's discretion in excluding the court reporter's audio recording of the plea hearing because the defendant did not attempt to supplement the transcript using the proper procedures; the trial court did not err in considering the audio recording to be irrelevant as the court well recalled the hearing and the persons affected during the hearing; and, while the defendant contended that the emotion that was exhibited during the hearing was due to being pressured to plead guilty, the defendant did not suggest that the recording of the hearing contained any characteristic that revealed the reason for the emotions displayed, and thus failed to show why the true, complete, and correct record of the plea hearing needed to be supplemented. DeToma v. State, 296 Ga. 90, 765 S.E.2d 596 (2014).

Record supplemented appropriately. — Since the trial judge held a hearing and supplemented the record, the defendant's claim that a lack of a complete transcript hampered the defendant's right to appeal lacked merit. Leeks v. State, 296 Ga. 515, 769 S.E.2d 296 (2015).

Failure to timely transmit record and delay in raising issue. — Defen-

General Consideration (Cont'd)

dant's due process rights were not violated by the trial court clerk's failure to timely transmit the record to the appellate court for docketing and resolution of the appeal because the defendant failed to raise this issue below, which contributed to the confusing state of the record, and the defendant failed to attempt any clarification or completion of the record via the remedies afforded by law during the seven year delay. Chernowski v. State, 330 Ga. App. 702, 769 S.E.2d 126 (2015).

In an appeal of a criminal conviction, the appellate court chose to sua sponte reinstate the case to address the appellant's enumerations of error on the merits despite the failure to set forth in the notice of appeal the intention to rely upon a previously transmitted transcript because the court had not yet addressed the issue in a published opinion and used the case to place future appellants on notice that similar procedural errors may result in automatic affirmance of a trial court's decision. Holman v. State, 329 Ga. App. 393, 765 S.E.2d 614 (2014).

Cited in Lewis v. State, 293 Ga. 110, 744 S.E.2d 21 (2013).

Felony Cases

Defendant failed to show prejudice. Although the habeas court erred in resting the court's judgment on procedural default, the denial of habeas relief was affirmed because the petitioner could not show from the record that the petitioner was not represented by counsel and that a pro se notice of appeal was legally valid and acted to deprive the trial court of jurisdiction to try the petitioner. Tolbert v. Toole, 296 Ga. 357, 767 S.E.2d 24 (2014).

Reporting of Voir Dire

Failure to request reporting of voir dire not error. — Counsel's failure to request that voir dire be reported in a defendant's criminal trial was not error or ineffectiveness as there was no requirement that the entire jury selection be reported and made part of the record in a non-death-penalty felony case; the defendant did not show any prejudice as a result. Adams v. State, 322 Ga. App. 782, 746 S.E.2d 261 (2013).

Incorrect or Incomplete Transcripts

Failure to provide transcript. Because the defendant did not supplement the transcript, the defendant's claim that the trial court erred by failing to take curative action when the prosecutor allegedly made a future dangerousness remark during closing argument provided nothing for the appellate court to review. Parrott v. State, 330 Ga. App. 801, 769 S.E.2d 549 (2015).

New trial warranted due to failure to include ex parte communication with jury. — In a medical malpractice case, the plaintiffs were entitled to a new trial because the communication between the court and the jury was not disclosed to the plaintiffs or the plaintiffs' counsel until after the verdict, the note and response were not made a part of the record, recollections differed as to the nature and timing of the communication, and it was impossible for the appellate court to determine if a defense verdict would have been demanded regardless of the effect of the communication on the jury. Phillips v. Harmon, 328 Ga. App. 686, 760 S.E.2d 235 (2014).

Application

Duty of appellant who states in notice of appeal that transcript will be transmitted. Homeowner's appeal in a wrongful foreclosure case was properly dismissed due to the homeowner's failure to file the transcript of the summary judgment proceedings for more than eight months after the deadline provided in O.C.G.A. § 5-6-42; the homeowner's proceeding in forma pauperis, O.C.G.A. § 9-15-2, did not excuse the homeowner's failure to timely obtain the transcript. Ashley v. JP Morgan Chase Bank, N.A., 327 Ga. App. 232, 758 S.E.2d 135 (2014).

Failure to timely file transcript. As a mother appealed the trial court's denial of her request to modify the parties' parenting plan with respect to their child, but she failed to provide any transcripts for the record on appeal, it was presumed that the evidence supported the trial court's factual findings. Gilchrist v. Gilchrist, 323 Ga. App. 555, 747 S.E.2d 75 (2013).

5-6-42. Procedure for preparation and filing of transcript of evidence and proceedings where appellant designates matter to be omitted from record on appeal; extensions of time for completion of transcript.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Clerk's failure to timely transmit record and delay in raising issue. — Defendant's due process rights were not violated by the trial court clerk's failure to timely transmit the record to the appellate court for docketing and resolution of the appeal because the defendant failed to raise this issue below, which contributed to the confusing state of the record, and the defendant failed to attempt any clarification or completion of the record via the remedies afforded by law during the seven year delay. Chernowski v. State, 330 Ga. App. 702, 769 S.E.2d 126 (2015).

Transcript of hearing on motion for summary judgment.

In an appeal of a criminal conviction, the appellate court chose to sua sponte reinstate the case to address the appellant's enumerations of error on the merits despite the failure to set forth in the notice of appeal the intention to rely upon a previously transmitted transcript because the court had not yet addressed the issue in a published opinion and used the case to place future appellants on notice that similar procedural errors may result in automatic affirmance of a trial court's decision. Holman v. State, 329 Ga. App. 393, 765 S.E.2d 614 (2014).

Timely Filing of Transcript

Dismissal proper where transcript not timely filed, etc.

Homeowner's appeal in a wrongful foreclosure case was properly dismissed due to the homeowner's failure to file the transcript of the summary judgment proceedings for more than eight months after the deadline provided in O.C.G.A. § 5-6-42; the homeowner's proceeding in forma pauperis, O.C.G.A. § 9-15-2, did not excuse the homeowner's failure to timely obtain the transcript. Ashley v. JP Morgan Chase Bank, N.A., 327 Ga. App. 232, 758 S.E.2d 135 (2014).

Appellants were unable to overcome the presumption that the delay in filing the trial transcript was unreasonable as the appellants did not properly order the transcript until after the 30-day period set forth in O.C.G.A. § 5-6-42 elapsed and the appellants failed to request an extension of time to file the transcript until after the appellees filed the appellees' motion to dismiss. Postell v. Alfa Ins. Corp., No. A14A2301, 2015 Ga. App. LEXIS 145 (Mar. 19, 2015).

5-6-43. Preparation and transmittal of record on appeal by court clerk; retention of copy by clerk; furnishing at no cost to Attorney General in capital cases; notification where defendant confined to jail.

JUDICIAL DECISIONS

Clerk's delay in filing transcript and failure to raise issue. — Defendant's due process rights were not violated by the trial court clerk's failure to timely transmit the record to the appellate court for docketing and resolution of the appeal

because the defendant failed to raise this issue below, which contributed to the confusing state of the record, and the defendant failed to attempt any clarification or completion of the record via the remedies afforded by law during the seven year delay. Chernowski v. State, 330 Ga. App. 702, 769 S.E.2d 126 (2015).

5-6-45. Operation of notice of appeal as supersedeas in criminal cases; bond; review.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Brown v. State, 322 Ga. App. 446, 745 S.E.2d 699 (2013); Graham v. State, 331 Ga. App. 36, 769 S.E.2d 753 (2015).

5-6-46. Operation of notice of appeal as supersedeas in civil cases; requirement of supersedeas bond or other security; fixing of amount; procedure upon no or insufficient filing; effect of bond as to liability of surety; punitive damages.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Sherman v. Atlanta Indep. Sch. Sys., 293 Ga. 268, 744 S.E.2d 26 (2013); Hal Wright Esq., P.C. v. Gentemann, 327 Ga. App. 650, 760 S.E.2d 654 (2014).

Applicability of Automatic Supersedeas Provision

Appeal to Supreme Court of contempt order issued by trial court acts as supersedeas, etc.

Because the supreme court maintained jurisdiction over the June 27th contempt order finding that the husband failed to comply with the terms of the parties' divorce decree and the supersedeas of that order remained in effect until October 18, 2012, the day that the remittitur was filed in the trial court, the trial court lacked jurisdiction on October 16, 2012, to enter an order holding the husband in contempt. Massey v. Massey, 294 Ga. 163, 751 S.E.2d 330 (2013).

Substitution on consent could not be challenged on appeal. — Debtor could not challenge a judgment entered on remittitur by raising arguments regarding an assignee's payment of consideration for a judgment entered against the debtor, although the issue was not within the scope of the prior appeal, as the debtor had consented to the assignee's substitution into the action in place of the bank, as well as the assignment of the judgment to it. Martin v. Hamilton State Bank, 323 Ga. App. 185, 746 S.E.2d 750 (2013).

Effect of Supersedeas

Effect of appeal on enforcement of judgment superseded.

In a personal injury lawsuit, the pendency of the defendant's appeal from denial of the defendant's motion to set aside the default judgment acted as a supersedeas depriving the trial court of the jurisdiction to consider the defendant's subsequent extraordinary motion for new trial. Fred Jones Enters., LLC v. Williams, 331 Ga. App. 481, 771 S.E.2d 163 (2015).

Supersedeas Bond

Charging order fell within disposition of property provision requiring bond. — Trial court did not abuse the court's discretion in requiring that the appellant post a supersedeas bond because the charging order against the appellant fell within the disposition-of-property provision of O.C.G.A. § 5-6-46(a) and the appellee was entitled to a supersedeas bond to secure the appellee's use of that property for purposes of the charging order. Gaslowitz v. Stabilis Fund I, LP, 331 Ga. App. 152, 770 S.E.2d 245 (2015).

5-6-48. Grounds for dismissal of appeal; amendments; correcting or supplementing record or transcript; effect of dismissal of appeal upon cross appeal; effect of deficiencies upon consideration of appeal.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Morgan v. State of Ga., 323 Ga. App. 852, 748 S.E.2d 491 (2013); Thomas v. State, 331 Ga. App. 641, 771 S.E.2d 255 (2015).

Mandatory Dismissal of Appeal

4. Moot Questions

Appeal deemed moot and dismissed.

In a post-divorce proceeding, the appellate court dismissed a father's appeal of the trial court's rulings with regard to the writ for habeas corpus filed seeking to enforce visitation rights because the appeal was moot since the father's visitation was restored. Higdon v. Higdon, 321 Ga. App. 260, 739 S.E.2d 498 (2013).

Delay in Filing Transcript

1. In General

Determination of whether delay was unreasonable or inexcusable required.

Trial court erred by dismissing plaintiffs' appeal under O.C.G.A. § 5-6-48(c) because the court was required to make findings on the issues of unreasonable delay in the filing of the transcript, the length of the delay, the reasons for the delay, whether the appealing party caused the delay, and whether the delay was inexcusable, thus, requiring a remand. Postell v. Alfa Ins. Corp., 327 Ga. App.

Delay in Filing Transcript (Cont'd)
1. In General (Cont'd)

194, 757 S.E.2d 661 (2014).

2. Unreasonable, Inexcusable Delay

Inexcusable delay in failing to file transcript.

Homeowner's appeal in a wrongful foreclosure case was properly dismissed due to the homeowner's failure to file the transcript of the summary judgment proceedings for more than eight months after the deadline provided in O.C.G.A. § 5-6-42; the homeowner's proceeding in forma pauperis, O.C.G.A. § 9-15-2, did not excuse the homeowner's failure to timely obtain the transcript. Ashley v. JP Morgan Chase Bank, N.A., 327 Ga. App. 232, 758 S.E.2d 135 (2014).

Delay Occasioned by Nonpayment of Costs

2. Unreasonable, Inexcusable Delay

Unreasonable delay warrants dismissal.

Dismissal of appeal for failure to pay costs of the appeal was affirmed because the defendants delayed 37 days in paying costs and such delay was prima facie unreasonable and inexcusable. Defendants cited no case law indicating that the 30-day period was to be calculated in any manner other than by calendar days. Cent. Ga. Dev. Group, Inc. v. Synovus Bank, 320 Ga. App. 893, 740 S.E.2d 812 (2013).

CHAPTER 7

APPEAL OR CERTIORARI BY STATE IN CRIMINAL CASES

5-7-1. Orders, decisions, or judgments appealable; defendant's right to cross appeal.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013). For annual survey on criminal law, see 65 Mercer L. Rev. 79 (2013). For annual survey on criminal law, see 66 Mercer L. Rev. 37 (2014).

JUDICIAL DECISIONS

ANALYSIS

General Consideration

State had no right to appeal from no contest plea. — Trial court's order vacating guilty plea and entering a plea of no contest in its stead was not an order from which the state could appeal under O.C.G.A. § 5-7-1. The order at issue merely vacated the defendant's guilty plea and substituted a no contest plea in its place, and the state had no right to appeal from such an order. State v. Hill, 321 Ga. App. 759, 743 S.E.2d 448 (2013).

State could not appeal denial of motion to recuse. — Trial court's order denying the state's motion to recuse the

judge in a criminal case was not reviewable pursuant to O.C.G.A. § 5-7-1(a)(9) because the state failed to obtain a certificate of immediate review from the trial court and failed to obtain permission to file an interlocutory appeal from the court as required by O.C.G.A. § 5-7-2. State v. Osborne, 330 Ga. App. 688, 769 S.E.2d 115 (2015).

Court of Appeals lacked jurisdiction.

Because the defendant did not file either a cross-appeal to the state's appeal or a separate notice of appeal regarding the superior court's adverse rulings on the other alleged violations of the statute regarding the presiding judge's allegedly improper questioning of the defendant, the appellate court lacked jurisdiction to consider the defendant's allegations of error arising from the superior court's adverse rulings. State v. Nickerson, 324 Ga. App. 576, 749 S.E.2d 768 (2013).

Cited in State v. Nicholson, 321 Ga. App. 314, 739 S.E.2d 145 (2013); State v. Wakefield, 324 Ga. App. 587, 751 S.E.2d 199 (2013).

Judgments Dismissing Indictment or Accusations

State may appeal order dismissing indictment, etc.

In the state's appeal, it was held that a trial court abused the court's discretion by dismissing an indictment against the defendant charging the defendant with felony theft by taking because the fact that it could take years before the defendant would be able to appear in court due to the defendant's immigration status did not provide any legal basis for dismissing the indictment. State v. Bachan, 321 Ga. App. 712, 742 S.E.2d 526 (2013).

Orders Suppressing Evidence

Suppression of evidence from sobriety checkpoint authorized. — Appellate court erred by reversing a trial court decision granting the appellant's motion to suppress evidence resulting from a traffic safety checkpoint stop of appellant's vehicle because the checkpoint at which appellant was stopped was unconstitutional since the checkpoint did not meet the case law requirement that supervisory personnel made the decision to implement the checkpoint. Brown v. State, 293 Ga. 787, 750 S.E.2d 148 (2013).

Application Generally

State's appeal from void order.

State's appeal from a trial court order that granted the defendant's amended motion for new trial in substance arrested the judgment of conviction, but the court did so improperly by considering the claim for relief, that the accusation was fatally defective, as part of the motion for new trial; rather, the state's appeal was pursuant to the state's right to appeal directly from a void or illegal judgment. State v. Graves, 322 Ga. App. 798, 746 S.E.2d 269 (2013).

Sentences not void. — State did not have the right to appeal sentences imposed by the trial court contrary to a plea agreement under O.C.G.A. § 5-7-1(a)(6) because the sentences were not void; the sentences were within the 20-year range of punishments for robbery and aggravated assault, O.C.G.A. §§ 16-5-21(b) and 16-8-40(b), and the trial court had jurisdiction over the case, pursuant to Ga. Const. 1983, Art. VI, Sec. IV, Para. I and O.C.G.A. § 15-6-8(1). State v. Harper, 279 Ga. App. 620, 631 S.E.2d 820 (2006) was overruled. State v. King, 325 Ga. App. 445, 750 S.E.2d 756 (2013).

5-7-2. Certification required for immediate review of nonfinal orders, decisions, or judgments; exception; motion for new trial.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

JUDICIAL DECISIONS

Failure to obtain required certificate.

Trial court's order denying the state's motion to recuse the judge in a criminal case was not reviewable pursuant to O.C.G.A. § 5-7-1(a)(9) because the state failed to obtain a certificate of immediate review from the trial court and failed to obtain permission to file an interlocutory appeal from the court as required by O.C.G.A. § 5-7-2. State v. Osborne, 330 Ga. App. 688, 769 S.E.2d 115 (2015).

Cited in State v. Nicholson, 321 Ga. App. 314, 739 S.E.2d 145 (2013); State v. Outen, 296 Ga. 40, 764 S.E.2d 848 (2014).

5-7-6. Construction of chapter.

Law reviews. — For article, "Appeal and Error: Appeal or Certiorari by State in Criminal Cases," see 30 Ga. St. U.L. Rev. 17 (2013).

TITLE 6

AVIATION

Chap.

CHAPTER 3

POWERS OF LOCAL GOVERNMENTS AS TO AIR FACILITIES

Article 2

Powers of Local Governments as to Air Facilities

Sec.

ARTICLE 2

POWERS OF LOCAL GOVERNMENTS AS TO AIR FACILITIES

6-3-21. Lands acquired, owned, leased, controlled, or occupied by local governments deemed for public purposes; effect on ad valorem taxation.

Any lands acquired, owned, leased, controlled, or occupied by counties, municipalities, or other political subdivisions for the purpose or purposes enumerated in Code Section 6-3-20 shall be and are declared to be acquired, owned, leased, controlled, or occupied for public, governmental, and municipal purposes; provided, however, that with respect to facilities located on such lands, which lands are located outside of the territorial limits of the political subdivision that leases such lands and which are leased to, controlled, or occupied by private parties, the interests created in such private parties, for the purpose of ad valorem taxation only, are declared not to be used for public, governmental, or municipal purposes and said resulting interests, so long as the interests create an estate in land, are subject to ad valorem taxation; provided, further, that the underlying fee interest in such property which remains vested in the county, municipality, or other political subdivision shall be deemed to be used for public, governmental, and municipal purposes. The municipality's interest in lands and the facilities located thereon located inside the territorial limits of a municipality which are owned by that municipality for the purposes

enumerated in Code Section 6-3-20, are declared to be used for public, governmental, or municipal purposes and are not subject to ad valorem taxation. (Ga. L. 1933, p. 102, § 2; Code 1933, § 11-202; Ga. L. 1983, p. 647, § 1; Ga. L. 1985, p. 1649, § 1; Ga. L. 2014, p. 824, § 1/HB 399.)

The 2014 amendment, effective April 29, 2014, substituted "so long as the interests create an estate in land" for "regardless of the extent of such interest, whether possessory or an estate in land" near the end of the first sentence.